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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 157.

EMMA S. FAYERWEATHER AND MARY W. ACHTER,
APPELLANTS,

vs.

THOMAS G. RITCH AND OTHERS, APPELLEES.

REPLY BRIEF FOR APPELLANTS.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

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EMMA S. FAYERWEATHER and EMILY W. ACHTER, *Appellants*, *vs.* THOMAS G. RITCH and OTHERS, *Appellees.* — No. 514.

JOHN B. REYNOLDS, *as Executor, Appellant*, *vs.* THOMAS G. RITCH and OTHERS, *Appellees.* — No. 515.

BRIEF IN REPLY FOR APPELLANTS.

STATEMENT.

The appellees in this case have presented their contentions in three briefs. The appellees, the executors of the estate of Mr. Fayerweather, have filed a brief by Mr. John E. Parsons and Mr. C. N. Bovee. All the colleges and institutions unite in a brief signed by Mr. Elihu Root and Mr. James L. Bishop, and also by counsel for the respective colleges. The President and Trustees of Bowdoin College file an additional brief signed by General Hubbard.

The appellants, taking these several briefs in turn, submit the considerations following, which appear to deprive the briefs of the force claimed for them.

Referring first to the brief on behalf of the executors, we invite attention to some inaccuracies in that part of the brief denominated "Statement of the case."

The professions of virtue, on page 7 of that brief, wherein repeated allusion is made to the desire of the executors to do nothing which would be "against the wishes of Mr. Fayerweather," are hardly consistent with the fact that the selections made by Mr. Parsons as the beneficiaries of the deed of gift were distinctly against the wishes of Mr. Fayerweather. By reference to the Surrogate's Record, volume VI., page 868, which is in part abstracted and incorporated in volume IV, page 90, of the record here, it will appear that whereas Harvard, Princeton, Trinity, and Brown are included as beneficiaries under the deed of gift, Mr. Fayerweather had distinctly excluded Trinity because "it was an Episcopalian institution and so did not give it anything," and Brown was excluded because "Brown was a Baptist institution and did not get anything." (See testimony of Ritch at folios 2601 and 2602 of the Surrogate's Record.)

Observe also the enormons disproportion between the gift made by Mr. Fayerweather to the Woman's Hospital ($10,000) and the increase put into the deed of gift by Mr. Parsons of $1,200,000.

Mr. Fayerweather, it is claimed, was modest in respect of his benefits, and made no attempt to perpetuate his name in connection with his gifts, but the donors in the deed of gift attach to the sum which they could no longer hold in view of the outcry against their attempts to convert it to their own use, amounting to $1,570,000, the condition "that the amount in each case should be used as a Fayerweather fund." Hence this property belonging to the appellants here is either invested or proposed to be invested all over the country in various college grounds in "Fayerweather Halls." It is admitted that "of the eleven hospitals and

twenty-one colleges named in said deed of gift, only five of the former and six of the latter were mentioned in the will."

We invite attention to the circumstance that the complaint in the Five College action, as framed, demanded judgment "in accordance with the allegations of this complaint." Nothing could accord therewith that did not proceed on the view that the trust *was valid* and that the next of kin had *nothing* to release.

The appellees pretend to regard as a grievance and as an unwarrantable averment in the bill of complaint that part thereof which refers to their conduct in the Five College action in the following terms (see vol. I, p. 7):

"Upon the trial of said action as aforesaid, the defendants herein, except John B. Reynolds, and Anner Amelia Reynolds, confederating and combining together and between themselves to prevent the entry of any judgment upon an actual determination of the invalidity of said releases so in issue, requested and induced the court to hold and decide that the right of the respective parties to said property and residuary estate did not require any consideration or decision of said issues: and said court thereupon made and rendered its decision *without considering, passing upon or including in judgment* the said issues: and omitted to decide upon these complainants' right to the affirmative relief by said answer prayed in respect to said releases."

But this averment is strictly true, and their denial of it is overthrown by their own evidence, to wit, by the record which they introduced of the "case on appeal" in Amherst *vs.* Ritch, which is correctly recited on pages 14 and 15 of the brief signed by Messrs. Parsons and Bovee, but which is not so fully set forth as it is in the appellants' brief at pages 194–196.

It appears therefrom that the allegation of the bill of complaint is precisely and exactly true; that the determination made by Justice Truax that the issue as to the releases *was*

unnecessary and *immaterial was the result of the contention of these appellees*, as stated in the bill of complaint.

The result obviously is that by way of exception to the ordinary effect of a judgment as an estoppel the issues here urged *were there excluded from consideration* upon the affirmative insistence and procurement *of these appellees*. Thereby they are subjected to the other estoppel upheld by this court in the case of Davis *vs.* Wakelee (156 U.S., p. 689, 690), arising *from the conduct of the parties*. The proper estoppel to be applied here is the estoppel against these appellees, who succeeded by their affirmative contentions in excluding all consideration of our issues in the trial before Justice Truax from, here and now, insisting that those issues *were, in fact, decided by him*.

It must not be overlooked that in addition to the irregular procedure set up in the bill of complaint whereby, as the complainants contend, the ordinary effect of the judgment in the Five College action was nullified, but also by the independent and separate and well-established estoppel against parties here, it does not lie in their mouths to insist here that the issues, excluded there, were decided there or might have been.

It is a little loose to state as is stated, on page 16 of the executors' brief, that Judge Truax rendered a decision "in favor of the plaintiffs." He rendered a decision sustaining the validity of the secret trust, and *therefore excluding as immaterial* all contentions respecting the *releases*.

Considerable attention is given in both briefs to the consideration that these complainants were guilty of some *laches* in not insisting upon separate findings of fact instead of a general decision. To this the answer is that when the provisions of the Code allowing a general decision went into effect, the pre-existing right of litigants to embarrass the

court by various, inconsistent, special findings was annulled. The only effect of special findings, had they been asked, would have been to require the trial justice to put in the findings, what he sufficiently put into his decision, the fact that he regarded the issues to the validity of the releases as *immaterial*, and therefore declined to find upon them. It is hardly worth while to elaborate this feature of the discussion. It is all "satin and prunella." It cannot elucidate *the substance* of the matter. It would be an elaboration *of forms* which might confuse, but would not elucidate, *the substance of* the controversy.

The appellees insist that the efforts made by the appellants' counsel to secure a determination at General Term of the merits of their contention respecting the invalidity of the releases must be held here to conclude them by the decision which, it is insisted by the appellees, was made by the General Term. Ex-Chief Judge Charles Andrews, whose brief is filed with ours, very accurately points out the misapprehension at bar between the time when section 1022 of the New York Code of Civil Procedure was amended, and the decision in Benedict *vs.* Arnoux as to the function conferred upon the General Term or the Appellate Division by that amendment, in respect of its powers as a court of original jurisdiction or trier of the fact. It would be a work of supererogation for us to elaborate that brief in that respect. That was for a time the erroneous supposition, and it was a supposition which not only pervaded the contentions of Colonel James and Mr. Blaikie in the Five College action, but it was generally shared by the bench. Chief Judge Parker was interrogated upon his cross-examination upon that subject, and it will appear by reference to his deposition that his memory was not clear upon the point. He does not recall any discussion as to the effect of section 1022.

It is now entirely apparent from his statement of the course pursued, that the then General Term supposed that they *had* the right to try the validity of the releases *as a new question*. It is not supposable that they considered *that it had been* tried by Judge Truax: or that they were called upon merely to support or overturn a decision made by him upon that subject. It will not be contended by any candid person that there has been any determination, as a matter of fact, of the issue of the validity of the releases, *except by* the General Term. And in view of the decision in Benedict *vs.* Arnoux, the conclusion is inevitable that such determination was by a court *which exceeded its powers*, and had *no* jurisdiction to determine the question as an *original* one.

Substantially the only answer made to this is that there was necessarily involved in the decision of the court of appeals in affirming the judgment in Amherst *vs.* Ritch a decision that the power exercised by the General Term was a valid determination by a competent tribunal of the issue of the validity of the releases as a matter of fact.

To that it may be replied that the question of jurisdiction there passed *sub silentio*, and such a determination, as this court has held in the cases cited below, does *not* establish the jurisdiction.

Louisville Trust Co. *vs.* Knott, 191 U. S., p. 236.
U. S. *vs.* Sauges, 144 U. S., p. 319.
Cross *vs.* Burke, 146 U. S., p. 87.

And see what the court of appeals has itself declared to be the extent of its judgments in—

Colonial City I. Co. *vs.* Kingston R. Co., 154 N. Y., p. 495.

It is further argued in the brief of Mr. Bishop, as a deduction from Amherst *vs.* Ritch, that there was

a *period of time* during which the General Term *had original* jurisdiction to decide questions of fact; that that time included the period from the entry of judgment under Justice Truax's decision down to the time when Benedict *vs.* Arnoux was decided: and that, although the decision in Benedict *vs.* Arnoux must now be accepted as conclusively restricting the power of the General Term or the Appellate Division to the decision of questions of law, the "law of this case" must be regarded as settled by the implications of the affirmance by the court of appeals in Amherst *vs.* Ritch, as affirming the power of the General Term to decide the validity of the releases as a matter of fact in the first instance.

The obvious basis of this contention is that (1) the rule invoked is a rule respecting the application of a course of decisions in State courts which have become a *rule of property;* and that (2) a Federal court is bound, as the law of the particular case, by the decision of the court of appeals in favor of the jurisdiction.

But (1) the question of the powers upon appeal of the general term is NOT a rule of property, and the principle invoked has no application.

Bolles *vs.* Brimfield, 120 U. S., pp. 763, 764.
Green *vs.* Neal, 6 Pet., 297.
Gelpcke *vs.* Dubuque, 1 Wall., pp. 205, 206, 207.

To the contention (2) we submit that while in some cases it is competent for the court of appeals to establish the "law of the particular case" against the general rule of law, that is not so upon a question of *jurisdiction.*

We submit as a settled principle that no court can establish jurisdiction *by the assertion of it.* We insist, therefore, that the exercise by the General Term of such jurisdiction is subject to review upon the general principles of law, in this

court. We insist further that the question of jurisdiction being always open collaterally, this court is not bound to accept an earlier decision of the Court of Appeals in the very case sustaining the jurisdiction, where the record of authority, both before and after the decision in Andrews *vs.* Kiel, is cited by the appellants as the annulment of the Court of New York and its laws as such power is or can be conferred upon the General Term or the Appellate Division, or any other appellate court. See cases cited below. Whatever error may have crept into Andrews *vs.* Kiel upon this point by unbroken series of decisions, since the New York Code abolished the distinction between actions at law and suits in equity, has been that no such function was or could be conferred upon an appellate court. The whole subject is very fully discussed in Beaudet *vs.* Arnaud (153 New York, 725). It is clearly pointed out, and sustained by numerous citations that under the law of the State of New York since the code of 1849 the earlier chancery practice which required a new trial upon each appeal in harmony with the present system of Federal jurisprudence, wherein appeals in admiralty and in equity involve an ultimate determination upon the merits, are annulled, and made entirely inoperative, with the result, for which we contend, that no decision made by the General Term upon the validity of subpoenas in Andrews *vs.* Kiel was within the power of the court.

This court has so frequently declared (1) that it will not be bound by the decision of the highest court of the State upon such a subject by its decisions in the very case, but will uphold the general current of authority, even upon the question of the effect of a State statute as upheld by the highest State courts, that we content ourselves with stating some of those cases:

Chicago *vs.* Ellington, 7 Wall., pp. 198, 207.
Ohio Life & Trust Co. *vs.* Debolt, 16 How., U. S., p. 432.
Cromwell Co. *vs.* Smith, 203 U. S., pp. 562, 565.

[illegible] [illegible] [illegible] [

Very little comfort can be deduced from the decisions either of Justice Truax or the Court of Appeals, so far as it must be here contended that the issue of the validity of the releases was conclusively determined in the State courts. The justice said that the question *was out of the case*, because the ground of recovery alleged in the complaint was correct, and that the releases were *immaterial*, and that therefore any questions relating *to them* were *immaterial*.

The Court of Appeals said that the question was out of the case because of the limitations upon its jurisdiction by the State constitution, and the arbitrary *presumptions* which it must indulge that the judgment below was supported by sufficient proofs, whether or not in fact there were *any* proofs whatever in support thereof. The Court of Appeals says "that substantially all the material facts have been disclosed by the evidence taken during the trial, in which both parties to the releases were then engaged."

That is not true as a matter of law, because the ruling in the early part of the trial before Justice Truax relating to the materiality of the facts affecting the validity of the releases, which ruling finally passed into judgment at the Special Term, had a tendency *to exclude* a *full* disclosure of the facts; and it cannot be said, as a matter of law, that other facts would not have been adduced, and other proofs submitted, if a *correct* rule had been applied at the trial. The decision of the General Term, that these issues were material and that the secret trust upon which the judgment below was rendered and based was void, and that the plaintiffs' right to such a judgment must rest upon the determination as to the releases in their favor, was a determination that the ruling of Justice Truax was essentially erroneous.

We may safely concede that, if the judgment had become final at Special Term and if there had been no appeal, then the correction of the error of Justice Truax by an appellate

tribunal not having been made, it would have remained forever the law of the case as between these parties that the validity of the releases was an immaterial issue, and that the complainants' title to the fund might safely rest and did rest upon the validity of the secret trust, and upon the proposition that the statute of wills had nothing to say to it. We might safely concede that the question here, *so far as it affects the residuary estate*, would then be *res judicata*.

But such is not the case. We concede, as this court held in the case of McKane *vs.* Durston, that the right to an appeal is not any part of due process of law, and that the State authorities may grant or withhold the right to an appeal; and that if they grant the right, they may attach to it such conditions as they see fit, without encroachment upon the Federal Constitution. But we insist that when it is part of the State law in its ordinary administration in the State courts of justice, that there *shall be* an appeal; and that when an appeal is taken and an essential error is judicially determined by the appellate court: then and in that case the *only* course which can then be taken in the regular administration of justice is to reverse the judgment and to grant a new trial; that the equal protection of the law and due process of law imperatively demand that, in our case, the whole theory of the trial court and its rulings having been *reversed*, we are entitled to a *judgment of reversal*, and a new trial in the court of first instance. We repudiate the contention of the appellees that there must be the *form* of a judgment of reversal in order to confer upon us any such right. We insist that when the General Term judicially decided that the course of the trial was absolutely and essentially erroneous, that what was affirmed in the complaint as the basis of the recovery and what was approved by the court, consistently therewith, as the basis of the judgment, was entirely erroneous; that when the secret trust was declared on appeal to be in conflict with the

statute of wills, and when it was therefore involved in the decision on appeal that the issue as to the validity of the releases, which the court below ruled to be immaterial, became of the utmost materiality, so that the judgment must be sustained upon proof, and the consideration of proof that the releases were valid: from that time on, all proceedings in the State court *were departures from* law *in its ordinary course* in the *regular* administration of justice; that what was done became a question *of jurisdiction;* that the jurisdiction to affirm, in the face of *such* a determination as to the correctness of the decision below, was not within the judicial power; that the determination of the General Term was in substance, although not in form, a reversal of the *judgment* below; and that to follow that determination upon the essence of the controversy, by a judgment *entirely inconsistent therewith*, affirming the judgment below, thus impeached, was an obvious and incontrovertible departure from due process of law; that it was an absolute denial to these litigants, as compared with all other litigants in the State courts, of the equal protection of the law.

It is not very important, in view of the limited jurisdiction of the New York State court of appeals, to pursue and apply this same argument to that court. *Ex nihilo nihil fit*, and if the *judgment of affirmance* of the General Term was a nullity, it could derive no force by affirmance, in turn, by the court of appeals. The court of appeals was not upon that appeal asked to condemn that exercise of jurisdiction by the General Term; the question, therefore, passed *sub silentio;* and even if it must be assumed that the decision in favor of the jurisdiction was involved in the decision of the court of appeals, yet that determination, being one *as to jurisdiction*, is not binding anywhere else, and certainly not in this court. The test, therefore, of its correctness is not one of State procedure or State statute, but it is properly included in the class of cases *which deny fundamental and*

essential rights, inherent in the proper administration of justice everywhere and established in New York as one essential to law in its regular administration in its courts, except by the sporadic decision in Amherst *vs.* Ritch, which therefore denied us the equal protection of the law.

It is, therefore, entirely inaccurate for the appellees in their briefs to say that the question of the *jurisdiction* of the General Term and of the Court of Appeals is not in anywise involved in this case. The question of their jurisdiction is involved in this: that we have challenged from the beginning to the end, in the original bill of complaint, and ever since, the *power* of those courts, as a matter to be determined by consideration of justice and essential and fundamental rights, as allowed to all other litigants in New York, to decide that our legal contentions were valid, and to follow that up by the utterly inconsistent judgments which both those courts rendered.

We pay no attention to the application for the amendment of the *remittitur* so as to permit Justice Truax to try the facts, in the first instance, of the validity of the releases, because that application was treated by the Court of Appeals, upon the contention of counsel for the appellees, as an application to *mandamus* the trial justice to take up those issues, and it was contended that the Court of Appeals had no such power. It is true that this court has the right to *mandamus* inferior courts, to do such acts as affect the jurisdiction of this court, when it *has* the power to review; but that is the condition and limit upon the power of this court to issue the writ of *mandamus*. The Court of Appeals *has no such power by statute*, and no such power is inherent in an appellate court *in the absence of* statute. The most that can be said of the application in the Court of Appeals to amend its *remittitur* is that it was addressed entirely to its discretion. It gave no reason for the exercise of its discretion in denying

the motion: and under familiar authorities, cited elsewhere, no estoppel can arise from this silence by way of inference or argument, as to the effect of the determination upon that motion.

See Judge Andrews' brief. Complainants' first brief, p. 196.

The argument in the briefs against the jurisdiction of this court to entertain this appeal as one direct from the Circuit Court, is bolstered up by a formidable array of citations; but an examination of the cases cited will show that there is not one of them that to the slightest extent affects or qualifies our contention. It may be safely conceded, and it is not important to us to deny, that the fact that the court below, in form, refused us the relief sought upon the preliminary plea that our right to invoke the jurisdiction was concluded by the adjudication in Amherst *vs.* Ritch that the releases were valid, fails to satisfy the condition of a direct appeal here under the first clause of section 5 of the act of 1891.

A critical examination of the record will show that the pleas do not necessarily present the question whether the adjudication upon the releases in Amherst *vs.* Ritch covered the *probate* features of our bills of complaint.

Although, in form, the final decree is one sustaining the pleas as a bar to the entirety of the bills, yet, in point of fact, it plainly appears that the decision of the court on the cross-bill of Mr. Fiero that the court, as a Federal court, had no jurisdiction over matters of probate, pervaded all the subsequent acts of the court. It requires very little critical analysis to show that the *real* decision was that the bill of complaint, so far as it affected the *probate* features, was without the jurisdiction of the circuit court of the United States *as a Federal court;* so that the consideration given to the pleas went upon that previous ruling upon the law of the court and of the case; and it therefore was only material to

consider, and it was only considered, whether the releases were a bar so far as they stood in the way of any attempt to review the decision of the State courts as to the property in the fund.

There are certainly other features of jurisdiction of the Circuit Court contained in the record and raised by plain assignments of error, to which reference is made by the allowance of the appeal made by Judge Lacombe.

The power of the Circuit Court of Appeals to reverse the decision on demurrer on the law of the case made by Judge Wheeler, when and as it was made, against the objection of these appellants and against their assignments of error, which was the basis of the rendition of the decree below, was certainly a question *of jurisdiction of* the Circuit Court; inasmuch as it was contended that the Circuit Court of Appeals on the injunction motion *exceeded its jurisdiction:* and therefore imposed no obligation to follow their finding; and that the Circuit Court, in respecting that void decision, *itself disregarded its own jurisdiction.* Its jurisdiction was to follow the law of the case as decided by Judge Wheeler upon demurrer: and when it abandoned its right in that respect, and substituted for the views of Judge Lacombe the "constraining" opinion of Judges Wallace and Shipman, it presented a question of its own jurisdiction, which was preserved by the assignments of error and comes here for consideration.

The interposition of a writ of error at the instance of a witness, the writ being sued out by the witness, Mr. Butler, collaterally to review a ruling made in the course of this equity suit by Judge Lacombe, concerning the propriety of requiring Mr. Butler to disclose the contents of the burned codicil, when its decision being, as contended, an act without power and one of force and void, was nevertheless respected and followed by Judge Lacombe, there was another question involving the jurisdiction of the Circuit Court, and its duty to

proceed in the orderly course of the trial upon its own authority and upon its own views of the law: instead of yielding to the coercion of the mandate under Mr. Butler's writ of error, is another question of the jurisdiction of the Circuit Court which is brought here by the assignments of error.

But if that question of the jurisdiction of the circuit court as a Federal court be not here, primarily, and as an independent source of jurisdiction of this court upon a direct appeal from the circuit court; the other question, arising under the *fourth* clause of section 5 of the act of 1891, comes here, and brings with it those questions of jurisdiction: and all other questions affecting the merits; and it suffices for our purposes to rest upon *that* ground for a direct appeal. We insist, therefore, that a question of the construction and application of the Constitution of the United States, to wit, the fourteenth amendment thereof, was presented and decided adversely to our contention by the court below from the beginning to the end of the case. We set forth in our bill of complaint the circumstances in relation to the judgment in Amherst *vs.* Ritch, setting it up as an impediment in the way of the determination of our rights, to be gotten rid of in the circuit court, as between the parties, coupled with suitable and specific allegations showing that the judgment in the State court was a cloud upon the title to this property, it being fair upon its face, and requiring extrinsic evidence to show its invalidity: and praying the court to disregard it or set it aside, as between the parties, as an impediment to the chief claim of right presented, because it was a judgment lacking due process of law, and which deprived us of the equal protection of the law. Those averments would have constituted an independent source of jurisdiction in the circuit court, aside from the other ground of the diverse citizenship of the parties.

When that judgment was received in evidence we made a

distinct motion to exclude it and disregard it (see vol. IV of the Record, p. 694) " on the ground that it appears by the record and the proofs that the series of decisions there not only did not adjudge the matter here; but deprived them of due process of law and the equal protection of the laws: and that it is, therefore, incompetent and irrelevant and of no value for any purpose as evidence in this court."

That motion was denied, and the recitals of the decree (vol. IV, pp. 777–783) show that the court expressly treated the contention as one arising *in limine* from the averments of the bill, and thereafter from the contentions in the progress of the cause: and was embraced in the ultimate and final decision of the court directly upon the point. These circumstances require that most of the citations of the appellees in their briefs shall be laid out of consideration: because these circumstances chiefly relate to the requirement that the contention under the fourteenth amendment must be made, either at the outset and in formal statement in the bill: or at any rate made, clearly, during the progress of the case: and be concluded by a specific and direct ruling thereon, which shall affect and control the final decree. All these requirements are fully satisfied by this record. It would almost suffice, upon the question whether there was a genuine, or merely a colorable or factitious application of the fourteenth amendment, to say that Judge Wheeler, directly and distinctly, sustained the contention made: and adjudged upon the demurrer that, as a determination of the validity of the releases, the judgment in Amherst *vs.* Ritch must be considered *as lacking in due process of law.* In addition to this, Judge Lacombe granted the injunction, not merely in comity in following the decision on demurrer of Judge Wheeler, but, as his subsequent comments on the decision of Judge Wallace in the circuit court of appeals show, with an intellectual and judicial approval of Judge Wheeler's

views, and a distinct *dissent*, so far as he was individually concerned, from the views of the circuit court of appeals.

In view of these serious, judicial expressions in support of our contentions about the applicability of the fourteenth amendment to the judgment in Amherst *vs.* Ritch as an adjudication, it is not enough to say that Judge Wallace regarded the contention as "preposterous."

If the question of a former adjudication can be determined by mere shells, husks, and forms, as the appellees have contended and are here contending, then the failure of the General Term *to reverse the judgment* rendered by Justice Truax, is a reason for denying a trial: and may result in unimpeachable verity in the judgment: and that veneration for forms may render any contention about the fourteenth amendment "preposterous." But the supposition is itself "preposterous."

This court said, in the case of Simon *vs.* Craft (182 U. S., p. 436), that the question of due process of law is not a question of form, but *of substance.* This court has many, many times gone behind judicial forms to examine *the substance of* the matter confided to its jurisdiction, to decide it *upon the right:* and refused to be controlled by the *forms* by which the abuse of right had been shrouded, and sought to be protected. It is, we submit, inconsistent with any conception of law in its regular administration by courts of justice, that, where an appeal is given, and the appellant upon appeal in due form establishes, judicially, that fatal error pervades the trial under review; that when the appellate court declares that that issue, treated as immaterial below, has become of the essence of the right; that when the appellate court is judicially informed by the record that a controlling ruling of the court of first instance has excluded from all consideration the evidence affecting the

very essence of the matter, as its essence is determined on appeal: that it is within the proprieties, or the power of the appellate court, nevertheless, to render a judgment of affirmance of the tainted and vitiated judgment under review: and to do it upon its own unauthorized view that the court below, if it had decided the issue, would have been sustained in its view, against the appellants' contention, by evidence in the record, which the court below utterly declined to consider or pass upon: or by its own unauthorized invasion of the province if a trial court, as distinguished from a court for the correction of errors.

Can *that be* a question of procedure? Can that be a question of construction or effect of State laws? If it be such, it is sufficient to say that in the case of every other litigant, except the case of these complainants, it is the settled rule of legal procedure in the regular administration of justice in the courts of New York that *no such* power in an appellate court exists. The State of New York has *never*, since 1849, *except in this one* instance, by any court, held that such a course is due process of law. In the case of every other litigant, it has been uniformly held that under such circumstances, the appellate court must *reverse* the judgment under review, and order a new trial. It is only these complainants who have ever been denied that, the equal protection of the law.

Truesdale *vs.* Burke, 145 N. Y., pp. 616, 617.
Smith *vs.* Platt, 96 N. Y., p. 637.
Rodgers *vs.* Clement, 162 N. Y., p. 427.
Iselin *vs.* Starin, 144 N. Y., p. 460.
Thomas *vs.* N. Y. Life Ins. Co., 99 N. Y., 250.
Ehrichs *vs.* De Mill, 75 N. Y., 370.
Whitehead *vs.* Kennedy, 69 N. Y., 462.
Foot *vs.* Ætna Life Ins. Co., 61 N. Y., p. 578.
Griffin *vs.* Maynard, 17 N. Y., 28.

The brief of the Colleges elaborates a specious argument to the contrary. It cites various cases relating to the powers of the chancellor before the Code of 1849. But their deductions therefrom are wholly erroneous. Those cases were fully reviewed in the case of Benedict *vs.* Arnoux; and the whole proposition therein placed on the correct ground. Other cases have followed Benedict *vs.* Arnoux. Other cases previously had declared the same rule. There was *no* period of time between the commencement of the case of Amherst *vs.* Ritch and the decision in Benedict *vs.* Arnoux where a contrary rule prevailed. On the contrary, the exercise of this jurisdiction by the General Term was sporadic, exceptional, and, so far as can be pointed out, these complainants were *the sole and only victims of the departure from* the general rule: and therein they were deprived of the equal protection of the law.

It seems to be clear that the question upon which this court has been asked to assume jurisdiction, upon a direct appeal under the fourth clause of section 5 of the act of 1891, is not a sham question, is not a colorable question; but, as we insist, is a question which can only be answered *as Judge Wheeler answered it;* and that, contrary to the direct holding in the final decree, the acceptance of the judgment in the Five College action, under the circumstances extrinsic to that judgment, disclosed by the proof and by the facts appearing from the bill of exceptions therein, put upon that judgment the character of *an act of the State*, through its courts, *depriving us* of our property *without* due process of law, and *without* the equal protection of the law. All the briefs on both sides are burdened with authorities upon the question of *res judicata.*

There is one case decided by this court, affirming a decision of the Circuit Court in California, held by Judges Sawyer and Deady, which is so exactly in point, which so exactly fits the facts in this case, and which so satis-

factorily discusses and deals with all these authorities, that we rely upon it as sufficient in and of itself to establish our contention, that the question of the validity of these releases is here an open question, and has not been in anywise adjudged. That is the case of Starr *vs.* Stark (2 Sawyer, pp. 615–623), affirmed as Stark *vs.* Starr in 94 U. S., pp. 485–486. We have always insisted, contrary to the decision of Judge Wallace in the Circuit Court of Appeals, that the rule that what "might have been" litigated, "might have been concluded, equally with what was actually litigated," was a rule, misstated and misapplied, in the Circuit Court of Appeals.

We have insisted and now insist that the true doctrine of estoppel by former judgment is no more than that the merits of any *issue* raised and *actually decided*, are conclusively presumed to have been decided correctly, and therefore the merits thereof cannot be again litigated; and that, by an independent estoppel, it is further included in the rule, that what was material and not decided is concluded. But that the latter is an estoppel against the party for his *laches*. Because the party who might have presented it for decision has omitted to do so, it may not be tried after. A party may not split up his case and have two trials thereof.

No such contention has been or can be made against the appellants, *because they labored, in season and out of season*, to have *this issue* decided; AND THE FAILURE TO CONSIDER IT WAS THE FAILURE OF THE COURT.

In Starr *vs.* Stark the complainant, seeking to recover land on two grounds, had been required in a former suit to elect upon which of these grounds to proceed, the court holding them to be inconsistent. He did so elect. He succeeded in the first suit upon the ground so elected, until he came to this court, where he failed. Then he renewed the claim upon the ground so excluded in a subsequent suit between the same parties, and it was there claimed that "what might have been" decided in the first suit rendered the

former judgment *res judicata* as to the second suit. But the United States Circuit Court held that to be a rule against a party guilty of *laches*, or splitting demands; and not applied where the *court* was responsible for the failure to consider the second ground. He succeeded in the second suit and the judgment was affirmed here.

In delivering the opinion of the Circuit Court, SAWYER, circuit judge, after stating the facts, says:

"The order of discussion pursued by counsel will be followed, and the question, presented by the answer, of a former adjudication first disposed of. It is not pretended by defendant's counsel that the cause of action now relied upon was, in fact, put in issue, litigated and determined in the former action; but it is insisted that it might, and therefore ought, to have been so presented, litigated and adjudged; and, this being the case, that the decree in that action is just as conclusive as if it had been so determined.

It is conceded that the ground of relief now relied on was, at first, set up in the complaint as one ground of action, in connection with the cause of action which was actually tried and determined; that the court held two causes set out to be inconsistent and incompatible, and required the plaintiffs to elect upon which cause they would rely, and omit the other; and that, in obedience to this order, plaintiffs did elect, and omitted the one now set up, relying upon the other; but it is insisted that the court erred in this ruling; and although there was an error, it was incumbent on plaintiffs to have it corrected on appeal; and that, failing to do that, they are barred by the ruling; and that the decree is as conclusive upon the whole title as if this ground of relief had been in fact litigated and adjudged. The complainants, on the other hand, insist that the two causes of action *were inconsistent:* and for *that* reason could not be properly relied on by plaintiffs and litigated in the same action; and that the order compelling plaintiff to elect was correct. If wrong in this view, it is still insisted that, since the title now set up was not in fact litigated, and not permitted to be litigated, the proceeding in the former case is not *res adjudicata.*

"It is quite clear to my mind, that the order compelling plaintiffs to elect upon which cause of action they would

rely, and omit the other, was erroneous. The facts constituting the grounds upon which the plaintiffs claimed equitable relief in both cases alleged are entirely consistent with each other. Only the legal conclusions that might be insisted on, could be inconsistent. It might be claimed, and was claimed, by the opposing counsel, that under one patent the legal title was in the city. If that had been true, the patent to Stark of course would have been void, and a cloud on the title, derived through the patent to the city: and the plaintiffs' equity, in respect to the city, rested upon the grant to the city in trust for their use and benefit, under the act of Congress, as occupants of the premises in question. On the other hand, the legal title having vested in Stark, under his patent, as decided by the United States Supreme Court, upon the same state of facts as that under which title in or through the city was claimed, the patent to the city was void: and the plaintiffs' equities as against Stark depended upon the additional, but consistent, acts of plaintiffs and Stark, alleged in the omitted cause of action, as affecting their individual rights. There can be no good reasons, it seems to me, why the plaintiffs should not have been permitted to allege the real facts upon both theories as they existed, and have since been proved: and leave the court to draw the correct conclusion therefrom and give such relief as the plaintiffs were entitled to receive, if found entitled to any, in accordance with the legal or equitable conclusion adopted.

If the circuit court of Oregon was right in compelling plaintiffs to elect, then the judgment in the former case is *not* a bar to this action: *because the complainant has never had an opportunity to be heard:* and he is *not* to lose his rights for not litigating them in a case wherein the law *will not permit them to be litigated.* If the court was in error, it still prohibited them from litigating the claim in that action, *and deprived the parties of a right,* by compelling them to elect one cause of action, and omit the other. In either case, *without any fault of their own, they have in fact been afforded no opportunity to be heard at all on their present cause of action.* They did elect, and the wisdom of that election was vindicated by the judgment of the highest court in Oregon, which sustained the title, ultimately relied on in that action, and decreed the appropriate relief; but that court also turned out to be in error, and the decree was reversed by a still higher tribunal. *Shall complainant now be*

cut off from procuring an adjudication of his rights because, under such circumstances, the court erroneously prevented him from having it adjudicated before?

It is, undoubtedly, well settled, that wherever any matter is directly in issue, and actually determined, by a court of competent jurisdiction, the determination is conclusive between the same parties and their privies, whenever the same matters again arise, even though collaterally. It is said in *La Guen vs. Gouverneur et al.* 1 John., Cases 492: 'The principle, however, extends farther. It is not only final, as to the matter actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided.' And this general principle is repeated in similar language in many subsequent cases. But the language is general, and must be considered in connection with the facts of the cases wherein it is used. The case cited affords as good an illustration as any of the principle upon which the rule is founded. The principle is, that an end should be put to litigation; that parties should not litigate their rights by piecemeal; that they are bound to be diligent, and when called upon to litigate their claims, they ought to present all they have to say, and that it is negligence to omit anything, *within their knowledge*, which might be available; and, if an omission is made, the consequence must fall upon the negligent party. *Negligence of the party himself is the main element of the principle upon which the rule is founded.* Says Mr. Justice Radcliffe, in the case cited: 'It is evidently proper to prescribe some period to controversies of this sort: and what period can be more fit and proper than that which affords a *full and fair opportunity to* examine and decide *all* those claims. This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention.'

Again (p. 495), after stating that if the rule as stated is established, he says: 'The only inquiry is, whether respondents, under the circumstances of the case, would have been permitted to make a defense on the trial at law, on the ground of the fraud which they now allege.' So, in the same case, Mr. Justice Kent says: 'Every person is bound to take care of his own rights, and to vindicate them in due season, and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant having the

means of defense in his power, neglects to use them, and suffers a recovery to be had against him in a competent tribunal, he is forever precluded.' (*Ib.* 504,) * * * 'All the testimony now produced was, for anything that appears to the contrary, equally within their power then as now, and yet no effort was made to produce it. * * * They were guilty of gross and palpable neglect in thus slumbering upon this ground of defense, and must now be precluded from setting it up as a cause of equitable relief against the verdict. It is *crassa negligentia* if a party does not seek after a thing, of which he is appraised, and, in law, amounts to notice. So, whatever is sufficient to put a party on inquiry, is good notice in equity. If I am not mistaken in the principles which I have laid down, their application to the case before us is direct and pointed, and they operate with irresistible and conclusive efficacy to produce the result.'

(*Ib.* 504–'5.) Now, what is the great principle which the learned judge so earnestly insists upon as excluding the defense, *but negligence of the parties to avail themselves of the opportunity before afforded to bring forward their defense and have its merits determined.* There had been a judgment for money recovered at law for proceeds of the sale of certain goods. Defendants then filed a bill in equity to restrain the collection of the judgment on the ground of fraud in representations as to the kind and quality of the goods, which fraud was available as a defense to the action at law, and was known to the defendants at the time; but which they did *not* attempt to set up: *and this neglect is the principle upon which the former judgment is held to be conclusive. In the case now in hand, this element of negligence is wholly wanting. The parties did set up this cause of action in connection with the one ultimately relied on, and sought to have it determined. But the court refused to permit them to be joined, and required the plaintiff to elect one and omit the other, and this ruling must be presumed to have been obtained at the instance of the defendant,* Stark, as it was made against the protest and the exception of the plaintiffs, duly taken, and noted in the order itself. *Does it lie in Stark's mouth now, after procuring such a ruling, and forcing plaintiffs against their protest, under the order of court, to omit one cause of action, to say that plaintiffs might have litigated the claim in that action, and, because they did not, must now be precluded?*

I think not. They *sought to* litigate it, *but were not permitted to do so.* The opportunity *was refused* them. *They* were *not* in fault. Suppose Stark had been in possession and brought suit against the Starrs to quiet his title, and they had set up both grounds of equitable relief in the answer: and evidence on both issues had been received: and a decree entered in favor of the Starrs, upon the city title only, *the court expressly declining to pass upon the other, on the ground that it was unnecessary to consider it under the view taken: and this decree had become final by affirmance, neglect to prosecute any appeal, or otherwise: would it be pretended in another litigation between the same parties, whose rights, under the claim of title not passed upon, are in question, that the former adjudication would be a bar, because it was presented and evidence taken, and might have been determined if the judge had seen fit to consider and decide it?*

Such is, certainly, not the doctrine of the authorities, as will appear by a number of cases cited in Caperton v. Schmidt, 26 Cal., 479. If it were so, the conclusiveness of the judgment would rest upon the discretion, negligence or something else, of the JUDGE, *over which the parties have* NO *control: and not upon the diligence, good judgment, or other acts of the parties themselves.*

"But it is earnestly argued, by defendant's counsel, that the ruling of the court, that plaintiffs could only be heard upon one of their causes of action, and compelling them to elect upon which they would proceed, cannot affect the operation of the decree as a bar to this action; *that they had a right to be heard upon every ground that they had upon which to demand the relief prayed; that the refusal of the court to allow them to be heard, was error, and should have been corrected in the same case on appeal; and that it cannot be reached in a collateral proceeding in another suit to establish the same right or procure the same relief, and several authorities are cited as sustaining the proposition. There appears to me to be some confusion of ideas in this part of the argument, and a misapplication of the legal principles involved.*

"*The authorities cited, properly applied, seem to me to overthrow the main proposition sought to be established.* The first authority cited is Cocke *v.* Halsey, 16 Pet. 71. In that case (page 87), the court say: 'The correct legal principle applicable to such proceedings is this: That in every instance in which a tribunal has decided upon a matter within its reg-

ular jurisdiction, its decision must be presumed proper, and is binding, until it shall be regularly reversed by a superior authority; and cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding. This principle has been too long settled to admit of doubt at this day, as in the cases of Thompson *v.* Tolmie and others, 2 Peters, 157; United States *v.* Arredondo, 6 Pet., 720; Voorhees *v.* The Bank of the United States, 10 Peters, 473; and the Philadelphia and Trenton Railroad Company *v.* Stimpson, 14 Pet., 458.' Now, what was the adjudication in the case under consideration? *Clearly, not that the case of action omitted under order of the court was invalid: but that the plaintiffs could only be heard in that particular suit upon one of the causes of action alleged:* and that they must elect upon which they would proceed, and withdraw the other. This was clearly an adjudication in the progress of the cause, which the court had jurisdiction to make: and the determination is as conclusive as any other made in the progress of the cause. *It was an adjudication between the parties, at the instance and in favor of one, against the other.* An adjudication, not that plaintiffs could not be heard at all on that cause of action, *but that both causes, on both grounds, for equitable relief, could not be heard in the same action,* and that they must elect upon which they would proceed and withdraw the other.

Suppose after making their election under the order, and proceeding, upon their last, amended complaint, as they did do, the decree of the court had been for the defendant, instead of the plaintiffs, as it was, and the plaintiffs had appealed upon the sole ground that they had been compelled to elect and withdraw their other ground of relief: and the supreme court had affirmed the decree, holding that the two grounds of relief could not be heard in that action: *that decision, whether right or wrong, would have settled the question by a direct adjudication, that the law of Oregon would not permit litigation of the two grounds of relief in one action. The decree in that case, would clearly* NOT *have been res adjudicata as to the cause of action which plaintiffs were compelled to withdraw: for the very rule invoked is, that the judgment or decree is conclusive, not only upon all matters actually litigated and determined, but upon all that might be litigated in the action; and as, by the law thus settled, the omitted ground of relief could not be liti-*

gated in that action, the case would not be within the rule invoked at all.

The adjudication by the circuit court is no less conclusive. It stands unreversed on that point. Right or wrong, it is finally determined, and is *res adjudicata* between these parties, and, if erroneous, cannot be reviewed collaterally in this or any other action. The ruling has the same effect, and is as conclusive as if it had been rendered by the court of last resort. It settles the question between the parties and their privies; and so the authorities cited in principle hold. My conclusion is, that the former proceedings are NOT a bar to this action, on the grounds already indicated." * * *

The case in 26 California, cited with approval in Starr *vs.* Stark (p. 620), contains numerous citations to the same effect, inviting particular attention to the case of King *vs.* Chase, in 15 N. H., p. 17, which is cited in complainants' first Brief, p. 191, which establishes, as regards this case, the conclusion that even if the validity of the releases be deemed to have been adjudged, so far as the residuary estate in controversy in Amherst *vs.* Ritch is concerned: it is nevertheless wholly at large, and undetermined, upon any *other* claim than that: and is *not* adjudged as involved in the assault upon the wills and probate: and has no effect upon those features of the several bills of complaint (Wilmington R. *vs.* Alsbrook, 146 U. S., p. 302; Watson *vs.* Jones, 13 Wall., p. 715, 734).

There is an irreconcilable difference between the brief for the executors, and the brief for the colleges, in one particular. Under his point 4, on page 98, Mr. Parsons insists that there is not before this court any question but that of the validity or the insufficiency of the pleas as pleas: and that by the same reasoning, whereby we are insisting that there should have been a new trial of the issues of the validity of the releases in the State court, the appellees are entitled to a new trial in the Circuit Court, if this decree shall

be reversed. That argument wholly loses sight of an established distinction between the jurisdiction of Federal courts in equity, and that of the State courts since the Code of 1849, as laid down in Benedict *vs.* Arnoux.

In the case of Blease *vs.* Garlington (92 U. S., p. 8) this court lays down the rule that all testimony taken in equity must be sent up to this court in order that it shall be in a position to render a final decree, and *not* send the case back for another trial. The colleges in their Brief, at page 34, insisting upon the propriety in chancery of a new trial at the General Term, say: "Before the Code of Procedure the rule in New York was that an appeal in an equity suit opened the whole matter, and warranted a review on the evidence as well as upon the law; that upon appeal the court in such cases, in the language of Chancellor Kent, 'acts with all the plenitude of a court of equity of original jurisdiction' (Gelson *vs.* Codwise, I Johns. Ch., 189–194; Dunham *vs.* Watkins, 12 N. Y., 555). The rule on appeals in chancery in United States courts is the same. An appeal in equity brings the whole case before the court and it is bound to decide the same, as far as it is in a condition to be decided on its merits (Waterloo Min. Co. *vs.* Doe, 82 Federal, 45; C. C. A., 9 Cir.; Garsed *vs.* Beall, 92 U. S., 684, 695). Said this court in Murdock *vs.* Moyer (20 Wall., 621, 622), 'the appeal *does* bring up the whole case for re-examination on all the merits, whether of fact or law, and for consideration on these, as though no decree had ever been rendered.'"

Mr. Blaikie's brief contains other authorities to the same effect at pages 519–524; and in his reply brief, pages 19 to 25. The cases cited under Mr. Parsons' point 4 are cases where the decree reviewed was a plea pure and simple, and not a pretended plea which was overruled by an answer or enlarged into an answer by a departure from matters single to the plea; or by evidence at large in the cause.

FURTHER AS TO THE JURISDICTION HERE.

The allegations in the original bill charge a lack of due process of law in the Amherst College judgment to bar the right of complainants; and they seek on that ground to remove that impediment in the way of their claim. That allegation was passed upon in the decree adversely, and sustains a direct appeal to this court which brings up the whole case. There can be no question that the construction and application of the Fourteenth Amendment was therein involved, and that it was not merely a formal but a substantial, Federal question, in view of the fact that four circuit judges are upon it equally divided in opinion, two of them having decided in this record that the use of the judgment in Amherst *vs.* Ritch, as a bar to all the matters therein set up, *violates* the Fourteenth Amendment; while the two other judges take the opposite view.

The question comes up substantially as regards its importance and difficulty, as it would have done, under the old practice, of certifying questions here upon a division of opinion; and in that case this court would hardly do otherwise than treat the question as worthy of an answer.

Davis and Farnum Manufacturing Company *vs.* Los Angeles (189 U. S., 216).

Press Publishing Company *vs.* Monroe (164 U. S., 110, 111).

Where the jurisdiction of this court attaches under Section 5 of 1891, it does not follow that a decision against the correctness of the appellants' contention upon the Federal question disposes of the appeal; or even that his abandonment of the point, does so. The *whole* case is, none the less, here for decision.

Home Life Insurance Company *vs.* Fisher (188 U. S., 727).

Chappell *vs.* United States (160 U. S., 509).

When the question of jurisdiction involves, as this one does, a question of the power of a State court, it may in New York always be examined collaterally, even when it is necessary to prove extrinsic facts in contradiction of the record.

O'Donoghue *vs.* Boies (159 New York, 98–100).

To hold that *upon such a question*, even if expressly decided (instead of as in Amherst *vs.* Ritch of being assumed *sub silentio*, or involved in the affirmance of the judgment of the general term) the decision of the Court of Appeals is conclusive upon this court, would be to abrogate the functions of this court upon the federal question and require it merely to register the decision of the Court of Appeals.

Gelpcke *vs.* City of Dubuque (1 Wall., 216).

Windsor *vs.* McVeigh (93 U. S., 274, p. 278 to 284).

Galpin *vs.* Page (18 Wall., 360, p. 365 to 367, 368, 373).

In Home Insurance Company *vs.* Fisher, (188 U. S., 72), this court held that, although the question upon which this court acquired jurisdiction had been meantime decided adversely to the plaintiff in error by this court, and that question was therefore not even pressed upon the argument; the jurisdiction to decide the *whole* case *was* nevertheless *retained.*

We further, commenting on the argument respecting the effect of the denial of the Court of Appeals of the motion to amend the remittitur, suggest that the Court of Appeals may have thought that the issue which was not tried, not having been decided as a matter of fact, was at large; and might be tried in another action. Certainly that is the view of the effect of the refusal of the court to try an issue, as decided by the Circuit court for California in the case of Starr *vs.* Stark (2 Sawyer, *supra*), and of the decision of this court

affirming the judgment in that case (94 U. S., 485–486) where this court says: "Having required the complainants to proceed in that suit only upon one cause or ground for relief, *the court left the other cause open* for any future suit which they might choose to bring."

While a party may not attempt to try his cause twice, and withhold part of his proofs, it seems to be the settled law of this court that, if *the court itself refuses to decide all* the elements in the case, the result is that the case is subject to another trial upon the excluded proofs, which may be taken to include those, in form, admitted, but excluded from consideration, upon an erroneous view of the law, reversed on appeal in fact, if not in form.

At all events, the Court of Appeals exercised a discretion in denying the motion, and the constitutional right to one trial, at least, does not rest in discretion, and cannot be adjudged by a denial of the right.

Simon *vs.* Croft (182 U. S., 427).
Jacobs *vs.* Marks (182 U. S. 591).

The statement in the brief of the Colleges at page 19 that the orignal bill asserted that the General Term had jurisdiction, or "although having jurisdiction," was an inadvertence, *which has been eliminated by amendment;* and there is now *no* concession of the jurisdiction of the General Term, nor was there at the final hearing.

Union Bank *vs.* Bush, 36 N. Y., p. 637.

It was competent to prove by parol the issues determined. Hence the testimony of the judges was admissible, *if they chose to give it.*

Mills *vs.* Caldwell, 2 Wall, p. 43.
Campbell *vs.* Rankin, 99 U. S., p. 263.
Bernards *vs.* Morrison, 133 U. S. pp. 522, 523.

The kind of "trial" which we had at General Term will be best appreciated by reading the cross-examination of Ex-Chief Judge Parker in the record. Judge Parker was called by the defendants to show that the General Term had decided the case on the merits, but on cross-examination these facts were developed: The General Term was composed of three judges, Justice Parker, Justice Follett and Justice Van Brunt. These judges differed two to one upon the controlling law of the case, even at General Term. Justice Van Brunt insisted that, while the widow was entitled to attack the secret trust, and subject it to a trust in her favor, in view of the violation of the statute of 1860; the next of kin had no standing so to do. In other words, Justice Van Brunt took the view that it was entirely *immaterial*, what had been done or misrepresented, so far as the next of kin, here complainants, were concerned. Judges Follett and Parker took the view which was subsequently the view of the Court of Appeals on that point, that the secret trust upon which these plaintiffs relied as valid, was invalid, and that *all* the parties were entitled to assail it; and, of course, it followed that those two judges considered that the evidence bearing upon the question of fraud practiced upon the nieces was relative and important. Yet Justice Parker testified in substance that no distinction was drawn in the consideration of the evidence of fraud in obtaining the releases; and it is quite apparent that the consideration of that question by the General Term, necessarily being from inconsistent points of view, was purely perfunctory. If they at General Term were lawfully deciding issues *de novo*, there would be, as there ought to be, some relief in the higher Appellate Court from the error of Justice Van Brunt, which necessarily pervaded his consideration of the evidence assailing the releases. Such an error by the judge of first instance, would have resulted, *according to the regular course of judicial business*, in a reversal and another trial.

Of course the Court of Appeals, has no power to deal ef-

fectively with this element of error which crept in at General Term. This consideration illustrates the absurdity of treating the perfunctory consideration given to the question at General Term as a trial of our essential issues.

Upon page 24 of Mr. Root's brief he argues that the Circuit Court exercised jurisdiction, and that therefore we have no grievance. It is not true that the Circuit Court exercised the jurisdiction invoked over the subject of wills or probate, but in the order dismissing the Fiero cross-bill decided that the Circuit Court as a Federal Court had no jurisdiction. That question of jurisdiction was not determined in favor of these appellants; and it is obviously absurd, in consequence, for the appellees to claim that for that reason the appellants cannot seek a review by this court of *that question* of jurisdiction.

It is argued on page 25 of that brief that, "the question whether the Circuit Court had power to grant this relief upon the facts stated in the Fiero cross-bill was not a question of federal jurisdiction, but was one merely of equity powers; and hence a direct appeal to this court on the ground of jurisdiction is unauthorized."

The answer to this is that the case propounded by the Fiero cross-bill set forth facts, and demanded relief, which was not merely addressed to equity powers, but was addressed to the exercise by the federal court of such equity powers.

The two questions may be in this instance, and are, identical questions.

See Williams *vs.* Crabb (54 C. C. A., 216), where the court says:

"The bill was dismissed for want of equity. That in this case must mean for want *of jurisdiction;* as upon the merits of the allegations, no question was or could be made,

against the sufficiency of the bill to make a case for setting aside both the will and the deeds and granting the relief, etc."

In the case of Williams *vs.* Crabb, therefore, the court entertained the question as one affecting the jurisdiction of the Circuit Court as a Federal Court and decided in support of the jurisdiction.

It ought to be kept in mind that, notwithstanding the formal language in disposing of the pleas, the court had previously to that time *decided* that the Circuit Court as a Federal Court had *no* jurisdiction of the subject-matter of the Fiero cross-bill; therefore of the Reynolds cross-bill, or of *that* feature of the amended bill which assails *probate*. If the right of this court to entertain jurisdiction is not restrained by *forms*, but may be placed upon an examination of *the substance* of the record below, it will be seen that the denial of jurisdiction over *that* feature of the case *must have* pervaded and affected the decision of the court, upon the formal disposition of the pleas.

The record shows that these complainants objected to the dismissal of the Fiero cross-bill, and their objections are recited in the order. They would have a substantial benefit from the establishment of Mr. Fiero's contention; and it is submitted that they have a standing to review that order, notwithstanding that Mr. Fiero did not take an appeal.

The argument at page 27 of Mr. Root's brief is rather an exercise of dialectics, than a logical discussion. He says that "the contention that the judgment was not a bar, because the validity of the releases had not been determined by a court having jurisdiction, presented a question of the jurisdiction of the State court. That was a question involving the construction and application of the laws of the State. No constitutional question could appear, until it was found

that the judgment had been rendered by a court without jurisdiction."

This is so far from being correct, that the truth is, on the contrary, that by the time it should be found that a judgment had been rendered by a court without jurisdiction, the federal question would have been *raised, discussed and decided*, because it is only by reference to the Fourteenth Amendment that the question can be answered whether the judgment, as construed in this sporadic case, was rendered within the jurisdiction of the General Term.

The appellees extract phrases from our answers in the State court, and base upon them various estoppels here. Thus the concession, made in the answer, of the right of the colleges to bequests made to them, up to the extent of half of the estate; and the concession in favor of Northwestern University, are incidents of the general position taken in Amherst *vs.* Ritch by these appellants. They are concessions *pro hac vice*, and not to be eliminated from their context, but the concessions are to be taken as a whole; and, as the whole was rejected and disregarded, obviously no estoppel can arise by dissecting and retaining part.

The defendants lay great stress upon Ward *vs.* Hasbrook (169 New York, 420) as authority for the affirmance of the Five College judgment, notwithstanding the condemnation by the General Term of the cause of action as set up in the complaint and approved at General Term.

That case is misapplied. It is but the assertion of the legal maxim *falsa demonstratio non nocet.* It has no application to this case where a *falsa demonstratio* was a violation of a rule of law affecting the jurisdiction to render this particular judgment, involving, not the correct solution of issues as matters of fact, but the erroneous judgment that these issues were not presented for decision.

Obviously such a wrong reason comes within the exception stated in Ward *vs.* Hasbrook.

The case of Ward *vs.* Hasbrook held that upon *ascertained facts*, the liability of the defendant for rent was an original obligation, and affirmed the judgment, although the appellate division had affirmed it on the theory that a liability of surety arose from the facts proved. That case is not inconsistent with Third National Bank *vs.* Cornes (1 Silvernail, 168) where the court says:

"The theory of the complainant was that the deed was fraudulent and void instead of being valid and good. The defendant was not called upon to make an answer to a cause of action, not only absent from the pleadings, but entirely inconsistent with their allegations."

Bradley *vs.* Aldrich (40 New York, 509–511).

"He was not apprised of any such claim until its declaration and maintenance appear in the decision of the judge." (Here *a fortiori*, the General Term.) "And to that he excepted which alone he could do."

Arno *vs.* Angell (62 New York, 510–512).

"It would be manifestly unjust to permit a plaintiff to secure the benefit of a new cause of action not embraced in the pleadings, and refuse to defendant the corresponding benefit of a defense not thus disclosed. The most liberal construction of the case would never justify such a result."

See also Smith *vs.* Woolfolk (115 U. S., 148).

The distinction here between a false demonstration and an utter change of the theory of the action is apparent.

Canton Company *vs.* Hewlett (169 New York, 249), where the court says:

"The plaintiff * * * could doubtless have maintained an action to reach any surplus. * * * If such an action had been brought, the referee's decision would have been justified; but the present action is not of that character. Its object was to declare the assignment fraudulent and void, while the issue recovered on, has proceeded on an affirm-

ance of the assignment. A party must recover *secundum allegata et probata*—not only according to his proofs, but according to his *allegations*. * * * The result of this course of procedure is that the appellant is rendered liable for a surplus which he contends does not exist, *and as to the existence of which he has never had his day in court.*"

Ward *vs.* Hasbrook is no authority for a judgment such as that pleaded, rendered upon a cause of action at war with that set up in the complaint, when a complete defense thereto *was disclosed* by the answer, and held to be immaterial, when that judgment gives to the plaintiff the benefit of a cause of action not only *not* embraced in the pleadings, but negatived thereby; and when the ignored defense, being revived by the application of the correct rule of law, was never tried by any court having jurisdiction so to do; and where the highest court has refused to submit that issue to the trial court, in the exercise of an uncontrolled and absolute discretion.

It is now urged here that this court under the rule of *stare decisis* should regard its refusal to issue a *certiorari* to review Landon *vs.* Bulkley as a decision of the law of this case.

Landon *vs.* Bulkley cannot be cited by the appellees with any force whatever. The complainants insisted that the court which decided the law of this case on the injunction appeal, constituted by including Judge Wallace, was an unauthorized court, inasmuch as he had decided the question discussed in this case in Landon *vs.* Bulkley, or Union College *vs.* Bulkley, which are identical. That contention was again urged upon application by us for *certiorari* to this court. Upon that application the present appellees insisted that the question was entirely different, and *that* contention the Supreme Court sustained. It passes out of the domain of argument into that of undiluted impudence for the appellees now to claim that the decision in the Landon case in anywise controls this. In point of fact the rule of *res*

judicata was there correctly applied. Union College being a defendant in this suit assigned its claim as one of the donees under the deed of gift, to Mr. Landon, for the purpose of bringing another suit therein, *pendente lite*. The absurd pretense upon which that suit went was, that, taking up the dissenting opinion in Amherst *vs.* Ritch and treating that as the law of the Federal court, Landon set in motion a "new case" by serving a notice "electing" to apply the prohibition of the Statute of Wills of 1860, to the devise to the Twenty Colleges. To the bill of complaint in Landon *vs.* Bulkley these appellees demurred. They conducted that case as a private enterprise, *omitting us altogether*, although we were named as parties. They brought on the argument on demurrer, *in our absence;* and they obtained a decision from Judge Wallace sustaining the demurrer. They then sent that opinion to Judge Wheeler, having then under advisement the demurrer to our complaint, claiming that it was precisely in point, and controlled Judge Wheeler's decision. Subsequently Judge Wheeler's decision came down, which in effect decided that the view of Judge Wallace in that case did *not* apply to this.

There is no rule of *stare decisis* involved in the refusal to apply the denial of the motion for *certiorari* in Landon *vs.* Bulkley to our case as an adjudication or as a rule of law controlling this case.

Union College had its day in court, and its contentions were decided adversely. Its effort here was to convince this court that the dissenting opinion of Chief Judge Andrews was the established rule of property, and that the donees were entitled to the fund. But if the contrary ruling of the majority of the Court of Appeals in Amherst *vs.* Ritch was error, it was permissible error, and did not involve any question whatever presented here.

As to the construction put upon Cromwell *vs.* County of Sac by Judge Wallace in the Circuit Court of Appeals, it

may further be said that it is directly in conflict with the further exposition of that case by this court in Southern Pacific Railway Company *vs.* United States, (183 U. S., 533,) where this court says: "As to property which was not involved in those suits, they are conclusive only as to matters which were *actually* litigated and *determined.* 'On principle *a point not in litigation* in an action, *cannot be* received as conclusively settled in any subsequent action upon a different cause, *because it might have been* determined in the first action.'" (Cromwell *vs.* Sac, 94 U. S., 351–356.)

IN REPLY TO MR. ROOT'S ORAL ARGUMENT.

It may well be said of the distinguished counsel for the appellees

> "The flowering moments of the mind
> Drop half their petals in our speech."

Now that the charm of his personality is withdrawn, and his statements are brought to the cold test of the record before this Court, and the reports of the New York Court of Appeals, it will appear that he has expounded the law of the Chancellor's rehearing in total disregard of the latest and, here controlling, test of the New York law.

If this Court will begin the consideration of the argument by a perusal of the opinions in

Benedict *vs.* Arnoux, 154 N. Y., pp. 715, 724, 727, and the cases there cited,
Snyder *vs.* Seaman, 157 N. Y., pp. 452, 453,
Truesdale *vs.* Burke, 145 N. Y., pp. 616, 617,
Rodgers *vs.* Clement, 162 N. Y., p. 427,
Lopez *vs.* Campbell, 163 N. Y., p. 345,
Smith *vs.* Platt, 96 N. Y., p. 637,
Van Beuren *vs.* Wetherspoon, 164 N. Y., p. 377-377,
Canton Co. *vs.* Hewlett, 169 N. Y., pp. 296, 297,
Matter of Fitzsimons, 174 N. Y., pp. 25, 26,

it will appear that what Mr. Root so confidently asserts is the law of rehearings on appeal in equity cases in New York, is clearly, unequivocally and finally settled NOT to be the law there, in the State courts.

If this Court will read section 1022 of the Code of Civil Procedure, (which Mr. Root contends is a plain authority for the "trial *de novo*," of the issue of the validity of our releases, by the General Term as a court of original jurisdiction,) and will examine that proposition in the light of the *principia* laid down in Story on the Constitution, section 1761, the Court will feel bound to reject Mr. Root's argument upon these threshold questions. Appellants will then hope that it thus appearing that the Court has not been aided to a correct solution of these questions by what Mr. Root has said, it will think that, laborious as is the duty involved, it is a debt to justice to peruse the appellants' briefs in the order of development of the case there adopted. This has been an enormous record to expound, from the point of view of saving labor to the Court. We have followed that design, and trust that it will appear, notwithstanding appearances, that we *have* served that end.

Mr. Root's impressive words depend for any force beyond the momentary impressions which are derived from his attractive personality, upon statements as to the record and as to the State law of New York, which as matter of fact are misleading, and as matter of law are wholly unsound, and in conflict with controlling authority. It is not true that the issues raised here by the course of pleading arise solely upon the plea of *res adjudicata*. The issues under which the testimony was taken were raised by answers at large and by pleas converted into answers. Complainants' first brief, pp. 146, 147, 164 to 210. The decision that they should be treated as pleas, or pleas substituted for the answers, was the result of the "constraint" upon Judge Lacombe of Judge Wallace's opinion (vol. I, pp. 259, 261; vol. IV, pp. 657, 775). The pleas are the apparent basis here of the decree below, but

that was because Supervising Architect Wallace put a new and objectionable foundation under the testimony which we erected and still insist is the real structure. It is *not* true that there are two decrees appealed from, one being a decree in favor of Hamilton college, the time to appeal from which expired before the appeal at bar was taken. See complainants' first brief, p. 257; Record, vol. IV, p. 776 (1). It is true that Mr. Fayerweather was for years determined to give substantially all his estate to institutions *of the sort* embraced in the ninth clause of the will; but it is true also that he was determined after he came into relations with Ritch in 1884 to violate the statute of wills by the scheme of circumvention invented for that purpose by Ritch, and that he abandoned that plan, if ever, only on November 11, 1890, when he realized that instead of "having a poor reliance in the forbearance of his heirs," he was in great peril, from the personal and private schemes of Ritch, to misuse the power which the first codicil conferred upon him. We have already referred to the sinister fact that every paper having any tendency to impose any trust upon the residuary devise of the first codicil, that every writing to show a trust was in Ritch's possession from its beginning until produced upon the probate contest, under the compulsion of proceedings for discovery.

The first codicil, restored, after being annulled by the "burnt codicil" on November 11, 1890, by the dying-day codicil, that codicil already full of suspicion is now, upon disclosures subsequent to probate and subsequent to the framing of issues in Amherst *v.* Ritch, shown to be the unholy offspring of fraud upon the testator, and not his will. If Mr. Fayerweather did not undo, on November 11 this fraud on the act of 1860, his whole testamentary scheme was defeated by fraud on the statute.

Why were these executors not at liberty, as Mr. Root says, to take any personal advantage from the absolute devise?

They were at liberty to do so, so far as any check upon

them arising from any declaration of trust, for Ritch held the papers, which showed the trust. They were at liberty so far as the disposition to do so was concerned, as their course immediately following Mr. Fayerweather's death proves, inasmuch as they tried to do so. (Complainant's Brief, pp. 237 to 256; 136 to 141.) There was nothing in the character of Vaughan to prevent. (See complainant's first brief, pages 206 to 210.) They did divert the estate to their own uses, for the deed of gift whereby Mr. Parsons altered Mr. Fayerweather's gift of $10,000 to the Woman's Hospital to $1,200,000, and whereby Harvard, Princeton, and Trinity and Brown were made beneficiaries (*against* Mr. Fayerweather's wishes).—(See Surrogate's Record, vol. VI, fol. 2600 to 2603. Complainant's first brief, p. 247), was taking a personal advantage. That is one result adjudged by Amherst *vs.* Ritch; and it required Mr. Root's distinguished services to attain that result which was not reached by any voluntary act of these executors. Mr. Root has now come, under the stress of making common cause with these executors against us, *to glose over their conduct.* He rebukes us for assailing them while he stands with a judgment in his hand that they were trustees *ex maleficio;* a judgment that what they swore in their answers in Amherst *vs.* Ritch was false swearing; a judgment which first disclosed that they withheld at probate the morning conversation, Exhibit O*a*—*i. e.*, the instructions for the last codicil, and disclosed that fact only after the issues in Amherst *vs.* Ritch were framed and while they were being tried; a judgment that they were the instruments of a scheme to defraud and circumvent the statute of wills; a judgment that this scheme gave life and validity to our title; a judgment that our releases thus obtained are the muniments of title of his clients; a judgment that *without our releases* there never was a time that his clients had *one dollar of* the $3,000,000 residury estate; a judgment that the averments to the contrary in his complaint in Amherst *vs.* Ritch must be abandoned and that the casual statement

therein that we claimed to have some interest which he prayed might be eliminated by the judgment (just as a foreclosure suit subordinates and excludes liens, adverse to the mortgage), means that such lien is the sole title, and that plaintiffs have acquired it by conveyance. *That* is the judgment upon which Mr. Root relies, not only to conclude our claims to the residuary estate, but to uphold the doctrine that the assault on the probate *might have been* introduced in Amherst *vs.* Ritch and so, must be deemed to have been concluded by the judgment.

We are willing to concede Mr. Root's exceptional smoothness in a trying situation. But is it not too much to accept a lecture from him in support of his high morality and lofty sentiments? He puts Messrs. Coudert, Rollins, (and why not Carter, Choate and the rest of the leaders of the bar) in company with the persons whom we assail, as gentlemen whom we accuse with a railing accusation under the stress of our needs. That is not true. And it was not fitting that Mr. Root should have said so. WE have brought a railing accusation against *no* man. We have confined our contentions, as to the misdeeds of those whom we have criticised. There is no consideration of propriety which ought to restrain us from objecting to Mr. John E. Parsons' *withholding* evidence of the instructions for the probate of the dying day codicil upon the probate, "when he thought it would hurt his clients' case to disclose it;" when he subsequently disclosed those instructions and his personal control thereof for another purpose, in the course of the trial of Amherst *vs.* Ritch. He may or may not be the "leader of the bar." If we must have a leader, our vote would be for Mr. Root. If Mr. Parsons has not done what we charge, our accusation is an idle word, that will pass him by. But it appears *out of his own mouth*, struggle as he did to avoid it, that the dying day codicil was probated *by the withholding of the essential instructions for that will* (Tyler *vs.* Gardiner, 35 N. Y., 590) that the absolute conflict between, what Vaughan has sworn

were instructions for that instrument, and the dying day codicil, ought to have received consideration at probate. It follows that there was a fraud on the probate court; and, as Mr. Parsons *was misleading* Mr. Coudert, our counsel, into the supposition that no order of discovery was required as he was disclosing *everything*, it was *a fraud* upon *us*.

Did Mr. Parsons do that? Read his testimony indicated at pages 91 to 142 of complainants' first brief, and it will clearly appear that he *did*. It will also appear that the facts of instructions for the codicil, and what they were, were *first* disclosed during the trial of Amherst *vs.* Ritch and elicited by Mr. Root, as shown in complainants' first brief at those pages.

Does it accord with candor to this court, for Mr. Root to contend that we could or should, in framing our issues in Amherst *vs.* Ritch, have anticipated what neither he nor we knew, or could know, *until* Vaughan and Parsons *disclosed it* upon the trial or subsequently; will Mr. Root contend that what we *then* knew was sufficient, or ought to have been made the grounds, for an assault on the probate in Amherst *vs.* Ritch? Could we then have the testimony of Arnoux how he coached and drilled the witnesses in apprehension of a bitter fight on the contest? Record, vol. I, pp. 497 to 502. It was *after* the judgment there, that Arnoux deposed to that; previously it was known only to the conspirators, the counsel and the witnesses.

But has not that a bearing upon the integrity of the probate trial? With other circumstances, would it not put a very different face from what was then possible, upon the fraud on the probate court here alleged?

Mr. Root puts in array the allegations of the answer in Amherst *vs.* Ritch with the bills here, and, contending that the charges made are identical, he draws the deduction illogical and false that *all* the facts *must have been then* in our possession; hence that we have been guilty of *laches*, which estops us from assailing the probate now and that,

thereby, these issues are barred because they *might have been* tried there.

To that we reply that analysis of the several pleadings does *not* support his postulate. The bills here obviously rely upon grounds then known, it is true, but also upon *additional* facts, giving force, persuasiveness and conviction to those then known, and *which were* and *could have been* known to us *only* by disclosures *subsequent to* the closing of the pleadings in Amherst *vs.* Ritch. The election to rely upon the probated testament was made—if any were made,—when we took our position in our pleadings *there.* What *might have been* tried in Amherst *vs.* Ritch was what could have been pleaded and proved there, which must, obviously, exclude what we did not learn *until* the trial and afterwards. As we were ignorant of the secrets of the enemy which now impeach the probate, it will not lie in their mouths nor indeed in any, to hold us to an estoppel by election, with only a *partial* or *imperfect* knowledge of the *material* facts. See appellants' first brief, pp. 89 to 142 and cases cited at page 142.

Judge Wallace's rule as interpreted by Mr. Root that what we here set up, as it might have been litigated in Amherst *vs.* Ritch, is concluded here, and that the rule applies to the *probate* contest, as well as to the residuary clause, has been abundantly discredited by the authorities at pages 179 to 210 of appellants' first brief. But it is now apparent that if it might have been alleged (or even was alleged, as it was not tried there,) in the absence of the fullness of proof here adduced could not have been tried there, and may be tried here.

Until Mr. Parsons will state that, when his client Vaughan said on the trial of Amherst *vs.* Ritch that he received in the *morning* or that he put on Exhibit Oa instructions for the codicil he lied; and that when he gave his Surrogate's testimony that the interview wherein "more institutions for

benefit" were mentioned, occurred in the *afternoon, after* the execution of the codicil and, therefore, not as instructions therefor he then lied, or only told Parsons that he first swore Mr. Parsons may be "THE LEADER OF THE BAR" if they will have him; but that shall not deter us from asking this Court to visit his conduct *with the proper consequences.* Those are that we shall have *one* fair trial, and *one* unimpeachable decree of the *validity* of the testamentary papers which move $6,000,000 away from us.

We concede that the New York courts have repeatedly, since Amherst *vs.* Ritch, reiterated its declaration that the "short form decision" under section 1022 of the Code of Civil Procedure by way of contrast with the previous form of findings has the characteristics of a "general verdict."

As applied to anything of substance here, that is the exposition of a new form of procedure, only. The effect of the proposition is no more than this. Previously under the practice, where the issue of fact was tried by a judge, it was essential that he should make findings covering all the facts which he found involved in his judgment and needed to support it. There resulted a competition in logic and dialectics between the counsel for the defeated party and the judge. The object of this competition was, so far as the counsel was concerned, to present so many "proposed findings" for rejection, subject to review on exception, that in the numerous forms of the same facts the judge might overlook some which were logically involved in the judgment, refuse to find them and upon appeal be reversed BECAUSE THE FINDINGS WERE INCONSISTENT, OR ONE OF THEM DID NOT SUSTAIN THE JUDGMENT. This section did not change anything *of substance.* It merely relieved the court from the danger of logical traps. His functions and the relative functions of the appellate court were not changed. Section 1022 still required to be construed and applied and it was so applied IN THE LIGHT OF ITS POWERS AS AN APPELLATE COURT. A perusal of

Benedict *vs.* Arnoux, 154 N. Y., pp. 723, 724,

will show that the construction here placed upon section 1022 by Mr. Root, was demanded in that case. It was refused. The court says: "It is one of the FUNDAMENTAL PRINCIPLES OF OUR LAW that questions of fact are to be tried and determined in a court of *original* jurisdiction! and it is *not* the appropriate function of an *appellate* court to determine controverted questions of fact and render final judgment upon *such* determination."

It is useless for us to follow Mr. Root through his *argument* as to the "General Verdict." It was calculated, if not designed, to create in this Court the impression that we *had* received the Chancery rehearing, so familiar to this forum, and that, therefore, we were contending for forms and not *substance.*

The use of the illustration in Amherst *vs.* Ritch, "*general* verdict," satisfactorily demonstrates the nature of the change from special findings to the short form decision. The difference is the same between a special verdict and a general verdict.

But *does* it, therefore, follow that the grievance here is remedied? The point here is, not that the appellate court cannot affirm a judgment, otherwise free from error, because the evidence properly in the record, in harmony with the theory of the action, and which, it is fair to presume, received *the consideration of* the trial court, under *correct* views as to its legal effect, may not be added for support to what has been avowedly considered. We do not assert the contrary. Such evidence may be considered as sustaining the conclusion reached below, under the presumption stated and illustrated by the "general verdict."

But there is no magic in a "general verdict" which will help the *denial* of a trial of the material issues by the court of original jurisdiction. If the illustration be followed up,

the trial resulting in a "general verdict" would have shown by appropriate rulings of law, what happened. The trial justice in an equity case admits almost everything that has a possible effect not only upon the issues, but upon the framing of the ultimate decree. The trial justice in a jury trial excludes everything that is not relevant to the issues. On appeal, rulings on the admission of evidence are very differently regarded, accordingly as the cause is an equity or a jury cause. Evidence admitted, before the justice only, is regarded as unlikely to do harm; while in the other case, it must appear that by no possibility could evidence improperly admitted have been harmful, else the judgment is reversed.

A general verdict, therefore, is the result of a careful attention to rules governing the issues to be embodied in that verdict and the consideration by the jury of the evidence affecting those issues.

The analogy therefore requires consideration of the fact that in this instance, the court would, consistently with its declared views of the law, *have excluded all our evidence of fraud as immaterial.* It would have charged the jury that the facts alleged in the complaint, if proved to the jury's satisfaction by a preponderance of evidence, entitled the colleges to a verdict *because those facts established a valid agreement enforceable notwithstanding the statute of 1860.*

Such a "general verdict" would have been corrected under review by a bill of exceptions or, as it is usually miscalled in New York, by a "case on appeal." No one would have claimed that a new trial could be avoided; or that, within the implications of a "general verdict," the truth could be ignored, and the false established from *implications* or *presumptions.*

The "general verdict" argument thus appears to be misleading and utterly to confuse and confound two absolutely different questions. One is: "Can a decision free from error be sustained *by presumptions* in aid of the short form

decision, consistent with the issue tried, although the record is silent respecting *its consideration* by the judge at trial?" The answer is "Yes."

The other question is: "Within the implications of a *general* verdict, and its sufficiency to sustain a judgment, are there embraced the *conclusive* presumptions that the verdict was rendered upon evidence, duly and under correct rules of law submitted to the jury, where the record shows that the charge to the jury was based upon an ascertained, controlling, and erroneous rule of law?" The answer obviously is No. But Mr. Root's contention again requires the answer "Yes."

Obviously there can be no presuptions on that question indulged. The bill of exceptions in one case, and the record and proofs, if necessary extrinsic to the record, or even in contradiction thereof, in the equity case, would show the very truth; and that would control the result.

In New York the common-law presumption of absolute verity in a judgment, is only a *rebuttable* presumption, and the truth is *not* excluded. Of course a judgment may be impugned in the federal courts by any means admitted, in the State where it was rendered, for that purpose.

O'Donoghue *vs.* Boies, 159 N. Y., p.
Reynolds, *vs.* Stockton, 140 U. S. p.

Mr. Root says their facts are not here. With profound gravity, Mr. Root declares that only the *ex parte* proofs of appellants are in the record. There is another smooth cover for the avoidance of issues which, if once tried, can only end in our favor, that is, if justice can ever prevail against the array of legal ability and the possession of our fortune, which enable the appellees to oppose us.

Why are not all the facts before the court? Because these appellees *have withheld them* and *obstructed* us in *presenting* them. Because they have elected to rely upon miscalled

pleas, which present no lawful defense. Because the court below *refused to* apply the settled rules of pleading inasmuch as it was "*constrained*" to follow the decision of two judges, one of them disqualified, (Appellants' Brief, pp. 147 to 158,) sitting on an interlocutory review of an injunction order upon the main question, (Record, vol. 1, pp. 259 to 261).

The facts,—if there be *any* facts favorable to appellees, not here, are absent because these appellees *withheld them* with their eyes open; took the chances of prolonging this litigation by dilatory pleadings; hoping to take a fresh start when, seven years after this suit was brought, the "pleas" should be overruled in this court.

In those circumstances the decree on the merits follows *pro confesso*, as the authorities cited in our briefs show. (Appellants' Brief, pp. 146, 147, 164 to 210; Mr. Blaikie's Brief, pp. 519 to 525; Mr. Blaikie's Reply Brief, pp. 19 to 25).

Is there any doubt that the frauds practised upon us *were necessarily involved* in the combination to circumvent the statute? Is it possible, now, to hold that the executors were dealing with us "*at arms length*" in negotiating the settlement during the Surrogate's contest?

They knew, and we did *not*, that every *representation* they made *was false*. *They* knew, that they were *not* relying upon the statute of wills, but engaged *in a deeply studied scheme to defraud it*. *They* knew, and we did *not*, that however they might belittle our claims, however they might disparage our rights, however, in information—misinformation it was— to our agent, Beardsley, to our counsel Coudert and Rollins, they might strive to mislead us, as to a less favorable will, as to the lack of all instructions for the last codicil, while Oa was in Parsons' pocket (Appellants' Brief, pp. 211 to 215), they knew, when they corrupted our agent, Beardsley; they knew that Lucy Fayerweather, Mary Achter and Emma Fayerweather were the only persons in the world for whose benefit—rather whose injury—this whole scheme of fraud on the statute was invented and carried on. They knew

that the Court of Appeals, if the question came squarely before it, might be relied on to say that "this residuary estate belongs to these three women. Give it up to them."

It was but a poor trick after all. Parsons tried it in the Edson Will, and didn't he lose just a little of his astonishing prestige, when the Court of Appeals said in 154th N. Y., "You must give it up, Mr. Parsons, your three associates may keep theirs" (Appellants' Brief, p. 202 to 205). It was a poor trick. It is only within half a century that the great "Leaders of the Bar" have built up the enterprise of showing their clients how *to violate* the law with impunity. They do not seem to feel any pangs of shame about it. Probably there are compensations which they make adequate.

But how about *the courts* of the country? The Court of Appeals of New York has given countenance to a judgment which sustains a fraud on its statute of wills. The great benevolence displayed in gifts to a favorite college, is put above the law; and the testator who wishes so to dispose of his estate, is upheld; while the law, as it was always construed before Amherst *vs.* Ritch, (See dissentiug opinion, Amherst *vs.* Rich, 151 N. Y.), is utterly annulled.

As Judge Lacombe says, (Record, vol. 1, p. 260):

"No doubt the ultimate result of the litigation in the state courts has been, *by refined technicalities*, to render inoperative *so far as this estate is concerned*, the provisions of a statute which seems to be the conception of a wise and commendable public policy."

Is *that* "the equal protection of the law"?

Far less than the demonstrated conspiracy to circumvent the statute of wills here, was held utterly to defeat the will in—

Matter of Will of Andrews, 162 N. Y., 115.

The prevailing opinion in the Court of Appeals is an affront to intelligence. Study that spacious and illogical argument to sustain a predetermined result.

The idea was invented for the purposes of Amherst *vs.* Ritch, of a devise (always before by that court held to be contrary to the power of the testator. See Bascom *vs.* Albertson, 34 N. Y., p. 616; Harris *vs.* American Bible Society, 2 Abb. Ap. Dec., 321; Chamberlain *vs.* Chamberlain, 43 N. Y., 413; Lefevre *vs.* Lefevre, 59 N. Y., 434; Stephenson *vs.* Short, 92 N. Y., 440; Chamberlain *vs.* Taylor, 105 N. Y., 185,) which was voidable only; because a release could vivify it. The idea was however allowed of a title passing to these complainants, *instanter*, upon the death of Mr. Fayerweather which they might, of course, with their eyes open, dealing with their own property convey to the colleges. Which could and did pass out of complainants only by a voluntary conveyance.

But then, the record disclosing that these were not voluntary conveyances. That they were obtained with every possible *concealment of* what it *was* they were conveying. With most forceful representations that the releasors were giving a quitclaim deed, that they did *not* own what they were releasing. The record disclosing, further, that the complaint in the very action was not founded upon any such conveyance, but was *in hostility to* any *such* theory of title or conveyance. That under such a complaint that very court had many times held that such *a change of* the cause o action was inadmissible, (see Frost *vs.* Koon, 30 N. Y., pp. 428, 430–445; Merchants' Bank *vs.* Thompson, 55 N. Y., p 11;) that same court having held (in Haviland *vs.* Willetts, 141 N. Y., 45) that *such ignorance of* the grantor's *rights* was of itself, *sufficient to* impeach the transaction, it is impossible to accord to such a decision any respect outside of the very territory wherein its views prevail because it has spoken.

Is not that opinion, instead of deserving that this Court should be astute to find *technical* grounds upon which to leave

it in force, worthy rather of the expressions which this Court once visited upon another, judicial anomaly ?

"It is insisted that in cases involving the construction of a State law or constitution, this court is bound to follow the latest adjudication or the highest court of the State. Leffingwell *vs.* Warren, 2 Black., 599, is relied upon as authority for the proposition. In that case this court said it would follow 'the latest, settled adjudications.' Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine.

"It cannot be expected that this court will follow every such *oscillation*, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority." * * * "But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many *exceptional* cases. WE SHALL NEVER IMMOLATE TRUTH, JUSTICE AND THE LAW, BECAUSE A STATE TRIBUNAL HAS ERECTED THE ALTAR, AND DECREED THE SACRIFICE."

Gelpcke *vs.* City of Dubuque, 1 Wall., pp. 205 to 207.

We respectfully urge that the decision of this Court in Reynolds *vs.* Stockton, 140 U. S., pp. 264, 265 to 271, forbids such a departure from the issues tendered by the complaint, and WHICH ALONE CONTROLLED THE COURSE OF THE TRIAL, in the court of original jurisdiction. As the State court ignored its own declared law in Appellants' Brief, pp. 200 to 201, *it should be confined to the collateral effect of its judgment settled by this court* in Reynolds *vs.* Stockton, 140 U. S., pp. 265 to 271.

THE DECREE HERE SOUGHT.

Now as to what decree this Court can render. The impeachment of the probate effectually made as it is, not only requires the whole series of testamentary papers, being an entirety, to be set aside, as between the parties; for the dying-day codicil is an obvious and demonstrated *fraud*, the cura-

tive force of the burned codicil cannot be invoked by reason of obstructions interposed by the appellees, and the whole testamentary scheme is not only *a violation of* the New York statute of wills, but a superadded illegal scheme to conceal the violation and circumvent the statute. The whole system of wills and codicils is, therefore, *void*. The dying-day codicil was void under the New York statute of 1848 (last page of appellants' first brief).

Matter of Andrews, 162 N. Y., 115.
Complainants' Brief, p. 89.

While this is more particularly the contention of the Fiero cross-bill, yet the probate of the will offered by him is excluded by the contentions of the appellees; and they are here still insisting that the jurisdiction to admit that will to anything resembling probate does not exist in the Federal court. The amended, original bill of complainants contains the general prayer for relief; and under the *whole* case-made, it is submitted that a decree can and should be made reversing the decree below, avoiding the releases and agreements, adjudging that the decedent was intestate as between the parties, requiring all appellees to account for what they have received with interest, to pay the same over to a receiver to be appointed and that the sums so received by said appellees with interest be distributed as in case of intestacy, to these complainants and the cross-complainant.

The apprehended injustice to the Executors, if as wrongdoers, they can urge that consideration, is more fanciful than real. The funds which they parted with will come back as the result of an accounting, from these defendants who received them.

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